Supreme Court, U.S.
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In The

Supreme Court of the United States

HAROLD E. SHEPLEY, JR., RICHARD A. KIMMEL, GARY L. MILLER, ELMER C. BEEMAN, JR., MARK E. DeFLORI, DOROTHY B. MARKER and a class of all others similarly situated,

Petitioners,

v.

NEW COLEMAN HOLDINGS INC., formerly known as THE COLEMAN COMPANY, INC., GLEN P. DICKES, DONALD G. DRAPKIN, WILLIAM J. FOX, HOWARD GITTIS, RICHARD E. HALPERN, FREDERICK W. McNABB, JR., RONALD O. PERELMAN, BRUCE SLOVIN, FRED L. TEPPERMAN, CARL T. TSANG, WARREN B. ARMSTRONG, KENNETH J. WAGNON, RICHARD D. SMITH, MacANDREWS ACQUISITION (KANSAS), INC., MacANDREWS & FORBES HOLDINGS, INC., JAY DAVIS, JEFFREY CURTIS and TIMOTHY P. COTTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a provision for reversion of pension plan assets to an employer must be clear and affirmative to satisfy 29 U.S.C. § 1344(d)(1)?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The April 1, 1999 Opinion of the United States Court of Appeals for the Second Circuit (App. 1-16) is reported at 174 F.3d 65; and the October 14, 1997 Opinion of the United States District Court for the Southern District of New York (App. 17-32) is reported at 1997 U.S. Dist. LEXIS 15877.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 1103(c)(1) provides:

> Except as provided in paragraph (2), (3), or (4) or subsection (d), or under section 4042 and 4044 [29 U.S.C. §§ 1342, 1344] (relating to termination of insured plans), or under section 420 of the Internal Revenue Code of 1986 [26 U.S.C. § 420] (as in effect on January 1, 1995), the assets of a plan shall never inure to the benefit of any

> employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

29 U.S.C. § 1344(d)(1) provides:

> Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if –
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> (B) the distribution does not contravene any provision of law, and
>
> (C) the plan provides for such a distribution in these circumstances.

STATEMENT OF THE CASE

Petitioners are former employees of the Coleman Company, Inc. (the "Company") who were participants in the Company's Pension Plan for Weekly Salaried and Hourly Paid Employees (the "Plan"). Respondents, New Coleman Holdings, Inc., et al. (collectively "Coleman") terminated the Plan on June 30, 1989 and took the $13,895,380 in Plan assets that remained after purchase of an annuity contract to cover defined benefits. This case involves whether Coleman was entitled to take those surplus Plan assets.

As of 1988, the Plan had potentially conflicting provisions for disposal of surplus assets following termination. On the one hand, the governing Trust Agreement provided for distribution of surplus assets to the employees:

> Upon termination of this Trust, the Trustee shall first reserve such reasonable amounts as it may deem necessary to provide for the payment of any expenses then or thereafter chargeable to the Trust Fund. Subject to such reserve, **the balance of the Trust Fund shall be liquidated and distributed by the Trustee to or for the benefit of the employees or former employees of the Employer or their beneficiaries**, as directed by the Employer. . . .

August 1, 1977 Trust Agreement, ¶ 15.2 (emphasis added).

On the other hand, the Plan provided for reversion of surplus assets to the employer, *but only to the extent that the surplus was "a result of overpayment"*:

> [N]o part of the Trust Fund shall revert to the Company . . . , except that after satisfaction of all liabilities of the Plan, any funds remaining in the Trust Fund as a result of overpayment may revert to the Company. . . .

January 1, 1984 Amended and Restated Plan ("1984 Plan"), § 9.2(c). The Plan also provided that if a balance remained in the Trust Fund upon termination "the Trustee shall dispose of such balance as the Company may direct." 1984 Plan § 11.5(d)(2). However, § 11.5(d)(2) did not indicate to whom the balance was to be paid.

An October 31, 1987 Pension Agreement between Coleman and the Union representing some of the Plan's participants provided for continuation of the Plan without amendment. Nevertheless, in December, 1988, in connection with a takeover bid by Respondent financier Ronald O. Perelman, a committee of the Company's

Board of Directors purported to amend § 11.5(d)(2) to provide that "the Trustee shall dispose of such balance by returning it to the Company". Thereafter Coleman asked the Union to agree to allow Coleman to take the surplus assets of the Plan, but the Union declined. Coleman then proceeded to terminate the Plan and take the surplus despite the Union's non-consent.

Petitioners brought the present action in the United States District Court for the Southern District of New York,[1] asserting that Coleman's taking of the surplus Plan assets violated the anti-inurement provision of § 403(c)(1) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1103(c)(1), because the Plan did not "provide[ ] for such a distribution in these circumstances", as required under ERISA § 4044(d)(1)(C), 29 U.S.C. § 1344(d)(1)(C). The District Court held that the December, 1988 purported amendment (by which Coleman sought to provide for return of surplus Plan assets to the Company) was ineffective because it was not adopted by the entire Board of Directors, as called for in the Plan's amendment provision.[2] App. 24 n.5. The District Court harmonized the Trust and Plan provisions by holding that § 9.2(c) of the 1984 Plan permitted Coleman to recover surplus funds resulting from overpayment of contributions to the Plan, but not other funds; that ¶ 15.2 of the

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[1] The District Court had original jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e).

[2] Petitioners argued in the alternative that the purported amendment was invalid because it violated the Pension Agreement, and that in any event it could not be given effect for five years after its passage pursuant to 29 U.S.C. § 1344(d)(2)(A). The Courts below did not reach these arguments.

Trust Agreement required that funds not resulting from such overpayments be paid to or for the benefit of the employees; and that § 11.5(d)(2) of the 1984 Plan (disregarding the purported amendment) permitted the Company to direct distribution of the surplus only in compliance with the Plan's other provisions. App. 28-31.[3]

Because there was no evidence that any portion of the Plan's assets resulted from any excess contributions by the Company, the District Court ruled that § 9.2(c)'s limitation to funds from overpayment was not met, and that Coleman was therefore not entitled to any of the surplus. App. 29, 31. The Court therefore granted partial summary judgment to Petitioners. App. 32.

On interlocutory appeal pursuant to 28 U.S.C. § 1292(b), a panel of the Court of Appeals for the Second Circuit reversed. **The Court construed the evidence in the light most favorable to Coleman**, and held that § 11.5(d)(2) of the 1984 Plan "states that upon termination, the Company may take any surplus", and that the term "overpayment" in § 9.2(c) of the 1984 Plan meant "the overage of the Plan assets . . . net of plan liabilities . . . at the time the Plan is terminated." App. 5, 8, 12-13. Concluding that Coleman is entitled to the surplus Plan assets under the terms of the Plan, the Court of Appeals remanded with directions to enter summary judgment for Coleman. App. 16.

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[3] The District Court found that, "viewing all the evidence," its reading was the "only . . . plausible interpretation of the Plan." App. 29.

REASONS FOR ALLOWANCE OF THE WRIT

I. This Court Should Grant *Certiorari* in Order to Resolve an Important Conflict Among the Circuits as to Whether a Reversion Provision in an ERISA Plan Must be Clear and Affirmative.

At common law, the corpus of a trust remaining after fulfillment of all of the trust's purposes would revert to the grantor, notwithstanding the absence of any provision for reversion in the trust instrument.[4] Although ERISA generally codified prior trust law, it specifically altered this rule by forbidding inurement of plan assets to an employer even after all plan benefits were paid, absent an express provision for reversion in the governing documents.

Thus, under ERISA's anti-inurement provision, "the assets of a plan shall never inure to the benefit of any employer", except that after satisfaction of all liabilities to participants and beneficiaries, "residual assets . . . may be distributed to the employer if . . . the plan provides for such a distribution in these circumstances." 29 U.S.C. §§ 1103(c)(1), 1344(d)(1).

The lower courts have generally held that § 1344(d)(1) requires a specific, affirmative, explicit and/

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[4] *See, e.g., Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 464 (4th Cir. 1987) (" 'Surplus' is the term used in the common law of trusts to describe any remaining assets in a trust after its purpose has been fulfilled. Under such circumstances, a 'resulting trust' for the benefit of the creator of the original trust arises *by operation of law*, unless he manifested a contrary intent") (citing Restatement (Second) of Trusts § 430 (1959)).

or clear grant in order for an employer to take a reversion. *See Rinard v. Eastern Co.*, 978 F.2d 265, 268 (6th Cir. 1992) (holding that ERISA creates a "presumption against any reversion" and "preclude[s] reversion of surplus assets to an employer unless there is **specific and affirmative** compliance with the conditions of § 1344(d)(1)(C)") (emphasis added); *Albedyll v. Wisconsin Porcelain Co. Revised Pension Plan*, 11 E.B.C. 1072, 1083, 1989 U.S. Dist. LEXIS 10453 (E.D. Wis. 1989) ("Section 1344(d) requires an **affirmative** provision if the employer is to recover the assets. Absent such a **specific** provision, the assets are provided to the employees.")[5] (emphasis added), *aff'd*, 947 F.2d 246, 255-56 (7th Cir. 1991) ("[S]urplus assets go to beneficiaries in the absence of an **explicit** provision to the contrary. . . . [U]nder ERISA, . . . unless the plan **specifically** provides for reversion to the employer, surplus assets go to beneficiaries and participants.") (emphasis added);[6] *International*

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[5] The District Court in *Albedyll* concluded that a reversion is not permitted under § 1344(d)(1) where "the agreement is at most ambiguous with regard to whether the employer was to receive the surplus". *Id.*

[6] The *Albedyll* courts' holding that surplus funds would go to participants and beneficiaries absent a sufficient provision for reversion to the employer is supported by the regulations of the Pension Benefit Guaranty Corporation, which mandate distribution of surplus assets to beneficiaries according to a prescribed formula whenever a plan does not "provide[ ], as of the date of plan termination, for the return of residual assets to the employer". 29 C.F.R. § 2618.30(a).

An award of surplus assets to participants would not constitute a windfall. Firstly, because anticipated plan contributions are simply part of a package of wage and benefit costs the employer is willing to exchange for the employees'

Union of Electronics, Electric, Salaried, Machine & Furniture Workers, AFL-CIO v. Murata Erie North American, Inc., 772 F. Supp. 870, 872 (W.D. Pa. 1991) ("ERISA makes clear that in order for [the employer] to have obtained the surplus assets the plan must have **affirmatively** provided for reversion. In order to overcome the general posture of ERISA that 'the assets of a plan shall never inure to the benefit of any employer,' the clear language of § 4044(d) requires employers to insert an **affirmative** provision if they seek reversion in favor of themselves.") (emphasis added; citations omitted), *rev'd on other grounds*, 780 F.2d 889 (3d Cir. 1992).[7] *But cf. Borst v. Chevron Corp.*, 36 F.3d 1308, 1316 (5th Cir. 1994) ("[S]ection 4044(d)(1) merely requires that a plan 'provide[ ]' for distribution of surplus assets to an employer, it does not say that the provision must be specific, explicit or express.").[8]

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services, the workers have borne the cost of any actuarial overestimate of the required contributions in the form of foregone wages. Secondly, the same inflationary spiral that created the higher-than-expected investment returns that accounted for the Plan's surplus correspondingly diminished the real value of the participants' defined benefits. Thus, giving the surplus to the participants merely makes them whole for foregone wages or diminished benefit value.

[7] The courts' strict construction of the statutory exception to ERISA's anti-inurement provision is consistent with this Court's precedent. *Cf. Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

[8] *Borst* involved a partial termination, which is not governed by § 1344(d)(1). *See* 36 F.3d at 1316. The *Borst* court distinguished *Albedyll* and *Rinard* on this basis. *See id.* at 1316 &

In the present case, the District Court followed the decisions of the Sixth and Seventh Circuits in *Rinard* and *Albedyll*, holding that Coleman had the burden of establishing that the Plan specifically and affirmatively provided for reversion. App. 25. The Court further held that "pension plans are for the benefit of the employees and, in order to have reversion to an employer, the plan must clearly state that intention." App. 30. Finally, "[a]pplying the principle of *contra proferentem*, the district court construed any ambiguity it could not otherwise resolve against Coleman." Court of Appeals Opinion, App. 9; *see* App. 31.

The Court of Appeals took the opposite approach: In effect, it started from a presumption that an employer is entitled to a reversion; it readily inferred a right to reversion from general language; and it strained to construe doubtful plan terms in favor of Coleman.

Although the Court of Appeals did not expressly disavow the principles set forth in *Rinard* and *Albedyll*, three aspects of its Opinion make its rejection of those principles abundantly clear.

First, the Court of Appeals held that § 11.5(d)(2) of the 1984 Plan, which calls for disposition of the balance remaining in the Trust Fund "as the Company may direct", constitutes a statement that "the Company may take any surplus", because there is no limitation against direction of the surplus to itself. App. 8. Such an inference from a **negative** – the absence of a restriction – does

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n.13. The discussion of § 1344(d)(1) in *Borst* should therefore be viewed as *dicta*.

not amount to an **affirmative** provision for reversion, as required under *Rinard* and *Albedyll*. *Cf. Unitis v. JFC Acquisition Co.*, 643 F. Supp. 454, 461 (N.D. Ill. 1986) (observing that provision that surplus assets "shall be disposed of as directed by the Committee" does "not say . . . that the distribution can be made to the company").

Second, the Court of Appeals expressly acknowledged that it was construing the evidence in the light most favorable to Coleman, as the party against whom summary judgment was entered below (App. 5); but it proceeded to direct the entry of summary judgment in favor of Coleman without ever going back to reconsider the evidence more favorably to the participants.[9] This improper direction of summary judgment evinced an indulgent view of entitlement to reversion that is inconsistent with the strict construction entailed by *Rinard* and *Albedyll*.

Third, and most telling, the Court of Appeals's favorable inclination toward reversion resulted in its rejection of a reasonable prospective interpretation of "overpayment" by the District Court and substitution of an implausible retrospective interpretation that awarded the

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[9] The court's direction of judgment against the participants based on assessment of the evidence in the light most favorable to the opposing party is contrary to the precedents of this Court. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Even apart from the need to resolve an inter-Circuit conflict over the requirement of an explicit, affirmative provision for reversion, *certiorari* is warranted in this case to secure compliance with this Court's holdings concerning the standard of review for summary judgment.

surplus to Coleman.[10] On the one hand, the District Court's interpretation of "overpayment" as excess contributions is eminently plausible. Indeed, it seems quite natural to determine overpayment by comparing what was paid to what was due, as of the time of payment.[11]

The Court of Appeals's principal objection to the District Court's interpretation was that "payment" means discharge of an obligation, and Coleman's obligations were not discharged until all benefits were paid – from which the Court of Appeals concluded that overpayment could only be determined by comparing assets to liabilities as of the time of termination. App. 12. But as the Court of Appeals acknowledged, in addition to its ultimate obligation to assure payment of benefits, Coleman "had obligated itself to make periodic contributions to fund the Plan".[12] App. 12. The Court of Appeals does not

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[10] The Court of Appeals agreed with the District Court that whether § 9.2(c) of the 1984 Plan provides for a reversion under the circumstances depends on the interpretation of "overpayment". App. 10.

[11] *See, e.g., Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947) ("we read the word 'overpayment' in its usual sense, as meaning any payment in excess of that which is properly due").

[12] Coleman's obligation to maintain a minimum level of Plan funding is mandated by law. *See Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 762 (1999) (referring to a plan sponsor's "continuing obligation under . . . ERISA to assure that the Plan was adequately funded") (citing 29 U.S.C. § 1082). Although this Court held in *Hughes* that employees have "no entitlement to share" in surplus assets of an ongoing defined benefit plan, 119 S. Ct. at 761 (*quoted in* Court of Appeals Opinion, App. 11), the *Hughes* case presented different issues than the present case, because there the employer did not terminate the plan, and did not take or use any plan assets for its own benefit. *See* 119 S. Ct. at 761-63.

suggest any reason in language, logic or otherwise that "overpayment" cannot be evaluated with respect to the periodic contributions payable by Coleman, rather than with respect to the total benefits payable by the Plan.

The Court of Appeals also objected that the District Court's interpretation would render the Plan's special grant of surplus assets to participants upon a "change in control" unnecessary, because they would already be entitled to the surplus even without the triggering change in control. App. 13-14. However, under the District Court's reading, Coleman retained the right to a reversion of any portion of the surplus that resulted from excess contributions to the Plan; and it also could have amended the Plan to provide for a greater reversion (subject to Union consent). Both the limited reversion allowed by the 1984 Plan and the possibility of amendment to increase the reversion would be precluded by a change in control. The Plan's "change in control" provisions therefore served a substantial purpose under the District Court's construction.

Thus, the District Court's interpretation was in accord with the ordinary meaning of the Plan's terms and preserved a meaningful role for each of the Plan's provisions.

On the other hand, the Court of Appeals's interpretation of "overpayment" as the overage of assets net of liabilities – in effect, as the surplus itself – reduces the phrase in question to a meaningless tautology: surplus funds which result from surplus funds may revert. The Court of Appeals's interpretation effectively reads both the Trust Agreement's express grant of the surplus to

employees and § 9.2(c)'s limitation to funds remaining "as a result of overpayment" right out of the Plan.

The Court of Appeals made no claim that the grant to employees in the Trust Agreement retains any effect under its reinterpretation. With respect to the limiting clause in § 9.2(c) ("as a result of overpayment"), the Court of Appeals's explanation of its purpose cannot withstand scrutiny. The Opinion explained that upon termination amounts sufficient to fund accrued benefits are set aside or cordoned off within the trust fund, and that the funds remaining after satisfaction of all liabilities include both the funds set aside to pay benefits as well as the surplus funds which are those remaining as a result of overpayment. App. 15-16. This reading of § 9.2(c) is untenable: because the cordoned off funds are set aside for the purpose of satisfying the Plan's liability for benefits, they cannot constitute funds remaining **after** satisfaction of all liabilities.[13] It remains inescapable that under the Court of Appeals's definition of "overpayment", the phrase "funds remaining as a result of overpayment" could be shortened to "funds remaining" without altering its meaning.

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[13] The Court of Appeals's theory as to why the phrase "as a result of overpayment" is saved from superfluity under its interpretation is the Court's own invention, never proffered by Coleman (and so never heretofore tested by counter-argument). Instead, Coleman's only explanation of that phrase, in a brief before the District Court, was that "there might be surplus funds that would not constitute 'funds remaining . . . as a result of overpayment' – for example, funds resulting from employee contributions." This "saving" construction is no more tenable than that assigned by the Court of Appeals, as no employee contributions were ever required or allowed under the Plan.

Indeed, because the Court of Appeals's interpretation makes "overpayment" equivalent to funds remaining after satisfaction of liabilities, § 9.2(c) could be shortened even further: "after satisfaction of all liabilities of the Plan, any funds remaining in the Trust Fund as a result of overpayment may revert to the Company" could be rewritten as "any overpayment in the Trust Fund may revert to the Company", again without changing the meaning.

It is a cardinal principle of contract law that each provision of a pension plan should be construed consistently with the entire plan, such that no provision is rendered nugatory. *See, e.g., Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982 (9th Cir. 1997). Because the District Court's interpretation harmonized all provisions of the Plan (including the Trust Agreement), while the interpretation of the Court of Appeals managed to "obviate[ ] the ambiguity on which the district court relied" (App. 13) **only by excising an express grant of the surplus to participants and annulling an express limitation on the Company's reversion**, the latter could only be supportable under a very indulgent standard for assessment of reversion provisions, and not under a "clear and affirmative" standard.

The issue framed by the differing approaches of the courts below is important. Congress found the question of entitlement to reversion to be of sufficient moment to warrant an express alteration of trust law in ERISA; and it has since confirmed its significance by amending the law at least four times to restrict employers' ability to take

reversions.[14] Moreover, the issue implicates one of ERISA's core concerns: the requirement of written plan documents to enable objective ascertainment of the parties' rights. *See, e.g., Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).[15] This objective is furthered by requiring a clear, explicit reversion provision.[16]

The present case is the first of which Petitioners are aware in which an employer has been permitted to

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[14] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1132, 100 Stat. 2085, 2478 (1986) (imposing 10% excise tax on employer reversions from qualified plans); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6069, 102 Stat. 3342, 3704 (1988) (increasing excise tax to 15%); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 12001 *et seq.*, 104 Stat. 1388-1, 1388-562 to -573 (1990) (codified at 29 U.S.C. § 4980(a), (d) (increasing excise tax to 20% if employer increases benefits or establishes qualified replacement plan, and to 60% otherwise), *see also* 29 U.S.C. § 1344(d)(2) (1988) (instituting five year waiting period for plan amendments that permit or increase reversions).

[15] As this court explained, "another of ERISA's core functional requirements [is] that 'every employee benefit plan shall be established and maintained *pursuant to a written instrument*.' In the words of the key congressional report, '[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan,' " *Curtiss-Wright*, 514 U.S. at 83 (citations omitted; emphasis in original).

[16] Because an explicit reversion provision is not difficult to draft, there is no apparent countervailing policy favoring the Court of Appeals's acceptance of an (at best) ambiguous provision. *See Murata*, 772 F. Supp. at 872-73 ("[I]t is easy enough for companies to protect themselves. They need only properly place the proper provision in the plan.. . . . [W]e see no reason to relieve employers of necessity of bargaining for what they want.").

recover surplus plan assets upon total termination without an explicit, unambiguous provision for such a reversion in the plan. Thus, the present case has created a split among the Courts of Appeals by implementing in practice the erroneous position espoused by the *Borst* court in *dicta*. The Courts of Appeals for the Second and Fifth Circuits now stand in disagreement with the Sixth and Seventh Circuits over this important issue. This Court should grant *certiorari* in order to establish a uniform standard of interpretation for putative reversion provisions under ERISA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 818 – August Term, 1998

(Argued: December 11, 1998 Decided: April 1, 1999)

Docket No. 98-7519

HAROLD E. SHEPLEY, JR., RICHARD A. KIMMEL, GARY L. MILLER, ELMER C. BEEMAN, JR., MARK E. DEFLORI and DOROTHY B. MARKER, and a class of all others similarly situated,

Plaintiffs-Appellees,

-v.-

NEW COLEMAN HOLDINGS INC., formerly known as The Coleman Company, Inc., GLEN P. DICKES, DONALD G. DRAPKIN, WILLIAM J. FOX, HOWARD GITTIS, RICHARD E. HALPERN, FREDERICK W. MCNABB, JR., RONALD O. PERELMAN, BRUCE SLOVIN, FRED L. TEPPERMAN, CARL T. TSANG, WARREN B. ARMSTRONG, KENNETH J. WAGNON, RICHARD D. SMITH, MACANDREWS ACQUISITION (KANSAS), INC., MACANDREWS & FORBES HOLDINGS, INC., JAY DAVIS, JEFFREY CURTIS and TIMOTHY P. COTTER,

Defendants-Appellants,

Before:

WINTER, *Chief Judge,* and
JACOBS and POOLER, *Circuit Judges.*

Corporate and individual defendants appeal from the order of the United States District Court for the Southern District of New York (Batts, *J.*) granting partial summary judgment to participants in a defined benefit pension plan and declaring their entitlement to the plan's surplus assets.

Reversed and remanded.

DAVID B. RODES, Pittsburgh, PA (John T. Tierney, III, Goldberg, Persky, Jennings & White, P.C., Pittsburgh, PA, on the brief; Richard M. Seltzer, Jani K. Rachelson, Joseph J. Vitale, Cohen, Weiss and Simon, New York, NY, of counsel), *for Plaintiffs-Appellees.*

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(Joel Field, White Plains, NY, on the brief), *for Amicus Curiae United Steelworkers of America, AFL-CIO.*

JACOBS, *Circuit Judge:*

The successor corporation to The Coleman Company, Inc. and other corporate and individual defendants ("Coleman") appeal from the October 10, 1997 order of the United States District Court for the Southern District of New York (Batts, *J.*) granting partial summary judgment to participants in Coleman's defined benefit pension plan and declaring that the participants (Coleman's former employees) are entitled to the surplus assets in the plan – a total of $13,895,380, plus interest. (Coleman also appeals from the January 12, 1998 order denying reconsideration of that ruling.)

We reverse.

BACKGROUND

From May 9, 1955 until June 30, 1989, Coleman operated The Coleman Company, Inc. Pension Plan for Weekly Salaried and Hourly Paid Employees ("the Plan"), an employee benefit plan under section 3(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(3) (1994), that was subject to coverage under section 4(a) of ERISA, 29 U.S.C. § 1003(a). The Plan is a defined benefit plan because it predetermines the level of benefits to which participating employees will ultimately be entitled. *See Brillinger v. General Elec. Co.*, 130 F.3d 61, 62 (2d Cir. 1997), *cert. denied*, 119 S. Ct. 1025 (1999). All fund contributions were made by Coleman,[1]

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[1] Section 9.2(b) of the Plan provides for contributions as follows:

and were then used to pay out current benefits or invested to provide benefits in the future.[2] The amounts of Coleman's contributions were based upon actuarial calculations of future benefit payments and rates of return for Plan investments.

Coleman terminated the Plan as of June 30, 1989. After satisfaction of all Plan liabilities to its participants and their beneficiaries, a surplus of $13,895,380 remained. Those residual assets are at stake in this case.

A group of former Plan participants brought this lawsuit, alleging that reversion of the remaining assets to Coleman would constitute (*inter alia*) a violation of ERISA, 29 U.S.C. § 1344(d)(1)(C). Coleman answered that it was entitled to the surplus assets under both ERISA and the terms of the Plan. Upon cross-motions for summary judgment, the district court granted partial

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(b) *Contributions.*

(1) No Employee shall be required or allowed to make any contributions to the Plan.

(2) The Company shall make contributions from time to time during the continuance of the Plan to the Trust Fund. The Company expects to make sufficient contributions to provide the benefits specified in the Plan.

(3) Forfeitures arising under this Plan because of termination of employment before a Participant becomes eligible for vesting, or for any other reason, shall be applied to reduce the cost of the Plan and not to increase the benefits otherwise payable to Participants.

[2] Section 4 of the Plan provides benefit schedules for a variety of retirement circumstances (normal, early, disability, etc.).

summary judgment in favor of the participants on their first claim for relief and dismissed the participants' remaining claims. The district court then certified the case for immediate appeal, *see* 28 U.S.C. § 1292(b). Coleman now appeals.

DISCUSSION

We review the district court's grant of summary judgment *de novo*. *See Young v. County of Fulton*, 160 F.3d 899, 902 (2d Cir. 1998). In doing so, we construe the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); *Maguire v. Citicorp Retail Servs., Inc.*, 147 F.3d 232, 235 (2d Cir. 1998).

I

ERISA distinguishes between two types of employee pension plans: "defined benefit plans" (like Coleman's), and "individual account plans" (also known as "defined contribution plans"). 29 U.S.C. § 1002(34)-(35).

In an *individual account plan*, the employer and employees contribute to individual employee accounts; each employee's retirement benefit is based upon the contributions, gains, losses, and expenses attributable to the account of that employee. *See* 29 U.S.C. § 1002(34). "[U]nder such plans, by definition, there can never be an insufficiency of funds in the plan to cover promised benefits, since each beneficiary is entitled to whatever assets are dedicated to his individual account." *Hughes Aircraft*

Co. v. Jacobson, 119 S. Ct. 755, 761 (1999) (citation and internal quotation marks omitted).

In a *defined benefit plan*, the employer contributes assets into a pool of funds from which predetermined benefits are paid.[3] *See Brillinger*, 130 F.3d at 62. "[T]he employee, upon retirement, is entitled to a fixed periodic payment regardless of the performance of the plan's assets." *Id.* (citation omitted). To estimate the contributions required over time to yield those fixed payments, employers retain the services of an actuary to make calculations about various factors, "including (1) the rate of return on the investment of plan assets over the life of the plan; (2) the date that the payment of benefits will commence; (3) administrative expenses that the plan will incur; and (4) the period of time during which benefits will be paid." *Wachtell, Lipton, Rosen & Katz v. Commissioner*, 26 F.3d 291, 293 (2d Cir. 1994). However careful and prescient the actuary, these calculations can only approximate the amount of benefits ultimately required; therefore,

> [i]f unsuccessful investment of the plan assets impairs the plan's ability to make up the scheduled payments from the plan assets, the employer must nonetheless make up any deficiency from its own assets. By the same token, *if the investment of plan assets is successful and produces a surplus, the employer benefits.*

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[3] Defined benefit plans may allow for employer-only contributions, employee-only contributions, or a combination of the two. *See* 29 U.S.C. § 1054(c). However, Coleman's Plan is funded by the employer only.

Brillinger, 130 F.3d at 62 (citation omitted) (emphasis added). "Since a decline in the value of a [defined benefit] plan's assets does not alter accrued benefits, [participants] similarly have no entitlement to share in a plan's surplus – even if it is partially attributable to the investment growth of their contributions." *Hughes Aircraft Co.,* 119 S. Ct. at 761-62.

II

Although participants in a defined benefit plan lack any presumptive entitlement to surplus assets, employers also lack any such entitlement unless the plan provides for an employer distribution. Under ERISA, the residual assets of an employee benefit plan can be distributed to an employer only when three conditions have been fulfilled: "(A) all liabilities of the plan to participants and their beneficiaries have been satisfied, (B) the distribution does not contravene any provision of law, and (C) the plan provides for such a distribution in these circumstances." 29 U.S.C. § 1344(d)(1). There is no dispute here that the first two conditions have been met: the Plan's liabilities were satisfied, and distribution to Coleman would not be unlawful. The question is whether the Plan provided for distribution of the remaining assets to Coleman.

The relevant provisions are contained in two documents – a 1977 Trust Agreement (established to implement the original 1955 Plan's provisions) and a 1984 amended restatement of the original Plan ("the 1984

Plan" or "the Plan"). Section 15.2 of the 1977 Trust Agreement states that Coleman "shall have no beneficial interest in the Trust Fund either during its continuance or upon termination of this Trust, *except as otherwise provided in the Plan.*" (Emphasis added.) The Plan does otherwise provide. Section 11.5(d)(2) of the 1984 Plan states that upon termination, the Company may take any surplus:

> (d) If, after the full equity of each Class has been set aside from the Trust Fund, there is any balance remaining in the Trust Fund, the Trustee shall dispose of such balance as follows:
>
> . . . .
>
> (2) If the Plan is being discontinued as to all Employees, the Trustee shall dispose of such balance as the Company may direct. In the event of a Change in Control, the Company's directions shall conform to the requirements of Section 11.6.

The only stated limitation (a specified change in corporate control) requires the Trustee to distribute any surplus pro rata among the Plan participants and beneficiaries.

In holding that the Plan does not confer on Coleman the power to direct self-payment of any surplus upon the termination and winding up of the Plan, the district court relied on Section 9.2(c) of the 1984 Plan, which it read as not fully compatible with Section 11.5(d)(2); although Section 9.2(c) confers on Coleman a power to order reversion to itself of "any funds remaining in the Trust Fund" upon termination, such funds remaining are subject to the qualifying phrase "as a result of overpayment." The passage reads:

> (c) *Irrevocability*. The Company and any Adopting Employer shall have no right, title, or interest in the contributions made by it to the Trustee or Trustees, and, except as permitted by Section 15.4, no part of the Trust Fund shall revert to the Company or any Adopting Employer, *except that after satisfaction of all liabilities of the Plan, any funds remaining in the Trust Fund as a result of overpayment may revert to the Company or Adopting Employer.* In the event of a Change in Control, such reversion shall not take place and the provisions of Section 11 shall apply.

(Emphasis added.)

The district court found that these provisions created an ambiguity (resolved by the court against Coleman): "one paragraph [Section 11.5(d)(2) of the 1984 Plan] provides for a determination by the Company regarding the remaining funds while the other sections [Section 15.2 of the 1977 Trust Agreement and Section 9.2(c) of the 1984 Plan] provide for reversion only of overpayment." "Resolution" of this ambiguity, the district court reasoned, "turns on the word 'overpayment' " in Section 9.2(c). The district court defined the word as "payment in excess of what is due" (citing *Webster's Third New International Dictionary* (1986)) and found "that a return on an investment does not constitute an 'overpayment.' " Because "the surplus assets in the Plan resulted from a high return on monies invested in the Plan, not from excess money contributed to the fund," the district court concluded that the surplus did not result from "overpayment," and therefore that Coleman was not entitled to the surplus. Applying the principle of *contra proferentem*, the district

court construed any ambiguity it could not otherwise resolve against Coleman and declared that the participants are entitled to the Plan's surplus.

III

We agree with the district court that resolution of this case rests on the meaning of the word "overpayment": upon termination of the Trust, the Plan confers on Coleman a "beneficial interest" in "any funds remaining in the Trust as a result of overpayment." We disagree, however, with the district court's conclusion that the qualifying phrase creates an ambiguity. "A word or phrase is ambiguous when it is capable of more than a single meaning 'when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.' " *United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp.*, 994 F.2d 105, 107 (2d Cir. 1993) (quoting *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988) (citation omitted)). "Courts may not create an ambiguity where none exists." *Id.* at 108 (quoting *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 306 (2d Cir. 1987)) (internal quotation marks omitted). We conclude that the other terms of the Plan, and its purpose and design, sufficiently fix the meaning and that the word "overpayment" in Section 9.2(c) of the Plan means the overage of the Plan assets (those contributed by Coleman, and any corresponding investment returns) net of plan liabilities (including the funding of vested pension obligations) at the time the Plan is terminated.

The question in this case is whether (as the district court held) the fact of overpayment is determined by reference to the actuarially established schedule of payments, and the amount of overpayment is any erroneous contribution in excess of that amount; or whether (as we conclude) the fact and amount of overpayment are determined by reference to the surplus of assets available to fund the Plan's liabilities when the Plan is terminated.

Like the district court, the participants define overpayment as "payment in excess of the actuarial amount due." Essentially, they argue, if Coleman contributes only the amounts that the actuary estimates will cover future benefits, there is no overpayment even if those amounts, augmented by investment returns, prove to be greater than needed to fund benefits and other liabilities. According to plaintiffs, Coleman can be deemed to have overpaid (and, by the terms of the Plan, be entitled to that portion of the surplus) *only* if Coleman's periodic payments exceeded the amounts specified in those actuarial estimates.

This view of overpayment rests on a misunderstanding of the fundamental nature of defined benefit plans. As the Supreme Court recently stated, the participants in a defined benefit plan "have no entitlement to share in a plan's surplus." *Hughes Aircraft Co.*, 119 S. Ct. at 761. Because employers rely upon multi-variable actuarial estimates in determining the amount to contribute to their plans, *see Wachtell, Lipton, Rosen & Katz*, 26 F.3d at 293-94, it is inevitable that their contributions (plus any investment returns) will ultimately prove to be either more or less than required. *See Hughes Aircraft Co.*, 119 S. Ct. at 761; *Brillinger*, 130 F.3d at 62. But the fact of a

surplus or deficit, and its amount, can only be determined by hindsight.

The district court relied in part[4] on the somewhat tautological definition of the compound word "overpayment" in *Webster's Third New International Dictionary* – "payment in excess of what is due" – without consulting the definitions of the constituent word "payment." Among the meanings of "payment" is "the discharge of a debt or an obligation." *Webster's Third New International Dictionary*. Although Coleman had obligated itself to make periodic contributions to fund the Plan, Coleman's obligations to the participants were not "discharge[d]" until all benefits had been paid (because Coleman would have had to make good any deficiency in Plan assets, *see Brillinger*, 130 F.3d at 62). Therefore, the fact of overpayment can only be determined upon termination of the Plan, when Coleman can determine whether it discharged its obligation "in excess of what is due," and the amount of any such overpayment must be the overage of assets net of Plan liabilities.

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[4] The district court also relied in part on our opinion in *Frank L. Ciminelli Constr. Co. v. Buffalo Laborers Supplemental Unemployment Benefit Fund*, 976 F.2d 834 (2d Cir. 1992). In *Ciminelli*, there had been a payment in excess of the predetermined periodic contribution (which the opinion calls an "overpayment" *passim*), and recovery was barred as untimely under ERISA § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii), which limits the period in which an employer may bring an action for the recovery of such overpayments. *See id.* at 835-37. The word "overpayment" is not an ERISA term of art, however, and its use in *Ciminelli* does not fix or limit the meaning of that word in the Coleman Plan.

Our reading of "overpayment" – which obviates the ambiguity on which the district court relied – is confirmed elsewhere in those parts of the Plan that address changes in corporate control, and which are geared evidently to inhibit an acquirer in some circumstances from using a Plan surplus to finance a takeover. The relevant provisions reference the termination of the Plan and describe the kind of computation that would be entailed in that event – the very calculation that would be made if the "overpayment" contemplated in Section 9.2(c) is (as we hold) the overage of assets net of pension obligations and other liabilities:

> 10.3 *Change in Control.* Notwithstanding the preceding provision of this Section 10 or any other provisions of this Plan, in the event of any such merger, consolidation, or transfer of assets or liabilities which is effected within three years following a Change in Control, the Accrued Benefit of each Participant and Beneficiary, . . . shall be increased as set out in Section 11.6 such that any excess, as of the date of any such transaction, of the fair market value of the assets of the Plan over the present value of all accrued benefits hereunder (*determined as if the Plan had terminated immediately prior to such transaction*) is exhausted.

(Emphasis added.)

It is very difficult to understand why that calculation would be done in the event that "the Plan . . . terminate[s]" except to calculate the amount of surplus available for distribution to someone. If (as the district court and the participants believe) the provisions they

cite direct the surplus to Plan participants and beneficiaries, it would be unnecessary to provide specially for the channeling of surplus to Plan participants and beneficiaries in the event of a "Change in Control." But that is exactly what the Plan does:

> 11.6 *Change in Control; Termination.* Notwithstanding the preceding provisions of this Section 11 or any other provision of the Plan, *in the event this Plan is terminated within three years following a Change in Control,* the assets of the Plan shall be applied in accordance with the preceding provisions of this Section 11 to satisfy all liabilities to Participants and Beneficiaries. *If, after satisfaction of such liabilities, there are assets remaining in the Plan, such assets shall be applied on a pro rata basis to increase the benefits of such Participants and Beneficiaries.* . . .

(Emphasis added.)

The participants posit one final question: if, in Section 9.2(c), the word "overpayment" means overage of assets net of liabilities, and the surrounding text seemingly already permits reversion to the company of "any funds remaining" "after satisfaction of all liabilities of the Plan," what is the limiting effect of the phrase "as a result of overpayment"? After all, an interpretation of a contract that affords "a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect." *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985).[5] The answer is apparent in the text of the Plan.

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[5] This does not mean that summary judgment is only appropriate where such meaning can be afforded to all terms of

The procedure for distributing Plan assets at discontinuance is set forth in Section 11.5. If the discontinuance is as to all employees, then (in a nutshell) the actuarial value of the total accrued benefits of various classes of employees and pensioners is calculated, and assets of the trust fund sufficient to fund those benefits are "set aside" for each class. The Plan's Retirement Committee has discretion to use the funds set aside in this manner for the benefit of each class by either purchasing annuity contracts, making the pension payments from the funds, or providing a lump-sum cash distribution. Section 11.5(d)(2) provides that if "after the full equity of each Class has been set aside from the Trust Fund, there is any balance remaining in the Trust Fund," the Trustee may dispose "of such balance as the Company may direct." This mechanism does not contemplate that the amounts set aside to fund benefits, including possible periodic payments over the life of the beneficiaries, are *outside* the trust fund; rather, they are cordoned off within it.

The disputed Section 9.2(c) should be read in light of this setting aside of assets. "[A]fter satisfaction of all liabilities of the Plan" in the manner more specifically

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a contract. The relevant inquiry in deciding a motion for summary judgment is whether "there is no genuine issue as to any material fact," Fed. R. Civ. P. 56(c), "a situation that obtains not only when the language is unambiguous, but also when the language is ambiguous and there is relevant extrinsic evidence, but the extrinsic evidence creates no genuine issue of material fact and permits interpretation of the agreement as a matter of law," *Nycal Corp. v. Inoco PLC*, 988 F.Supp. 296, 299 & nn.9-11 (S.D.N.Y. 1997), *aff'd*, 166 F.3d 1201 (2d Cir. 1998).

described in Section 11.5, the Trust Fund very likely could contain two types of assets:

(i) amounts set aside for the funding of benefits, *i.e.*, the Plan's liabilities;[6] and

(ii) amounts representing the overage of Plan assets net of those liabilities, *i.e.*, funds remaining "as a result of overpayment."

Only the latter amounts can properly be deemed surplus to which Coleman is entitled. The sensible proviso in Section 9.2(c), allowing reversion to the Company only of "any funds remaining in the Trust Fund as a result of overpayment," is perfectly consistent with the idea that Coleman may direct to itself the full surplus assets of the Plan.

CONCLUSION

We conclude that Coleman is entitled to the surplus assets under ERISA and the terms of the Plan. Accordingly, we reverse the district court's October 10, 1997 and January 12, 1998 orders, and remand to the district court with directions to enter summary judgment in favor of Coleman.

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[6] Even if all accrued benefits had been paid out of Plan assets, amounts would have to be set aside in the trust fund sufficient to cover any contingent liabilities of the Plan.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

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HAROLD E. SHEPLEY, JR., RICHARD A. KIMMEL, GARY L. MILLER, ELMER C. BEEMAN, JR., MARK E. DeFLORI, DOROTHY B. MARKER, and a class of all others similarly situated,

Plaintiffs,

95 Civ. 4470 (DAB)
MEMORANDUM and ORDER

-against-

NEW COLEMAN HOLDINGS INC., formally known as The Coleman Company, Inc., GLEN P. DICKES, DONALD G. DRAPKIN, WILLIAM J. FOX, HOWARD GITTIS, RICHARD E. HALPERN, FREDERICK W. McNABB, JR., RONALD O. PERELMAN, BRUCE SLOVIN, FRED L. TEPPERMAN, CARL T. TSANG, WARREN B. ARMSTRONG, KENNETH J. WAGNON, RICHARD D. SMITH, MacANDREWS ACQUISITION (KANSAS), INC., MacANDREWS & FORBES HOLDINGS, INC., JAY DAVIS, JEFFREY CURTIS, TIMOTHY P. COTTER, and UNION NATIONAL BANK,

Defendants.

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DEBORAH A. BATTS, United States District Judge.

Plaintiffs are all former employees of Coleman Company, Inc. As former employees, Plaintiffs seek to recover the surplus assets of a pension plan that was funded by Coleman Company, Inc. The Defendants include, New

Coleman Holdings Inc., formally known as the Coleman Company Inc. ("Coleman"), and MacAndrews Acquisition Co. (Kansas), Inc., ("MacAndrews Kansas"), a subsidiary formed by Defendant MacAndrews & Forbes Holdings, Inc., ("MacAndrews & Forbes"), to acquire Coleman. Defendants also include Glen P. Dickes, Donald G. Drapkin, William J. Fox, Howard Gittis, Richard E. Halpern, Frederick W. McNabb, Jr., Bruce Slovin, Fred L. Tepperman, Carl T. Tsang, Warren B. Armstrong, Kenneth J. Wagnon, Richard D. Smith, Ronald O. Perelman, Jay Davis, Jeffrey Curtis, Timothy P. Cotter, and Union National Bank.[1] The individual Defendants were either Coleman directors at the time of the events in question or were trustees of the pension plan. Plaintiffs and Defendants cross-move for summary judgment.

Plaintiffs move for a declaratory judgment, among other things, that the pension plan agreements provide for all remaining assets to be distributed to the employees. Defendants move for a declaration that the same agreements provide for distribution of the remaining assets to the employer.

I. BACKGROUND

From May 9, 1955, until June 30, 1989, Coleman maintained The Coleman Company, Inc. Pension Plan for Weekly Salaried and Hourly Paid Employees (the "Plan").

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[1] On July 25, 1997, the Court so ordered a stipulation dismissing Union National Bank without prejudice.

(Joint Local Civil Rule 3(g) Statement ¶ 4.)[2] The Plaintiffs, former weekly salaried or hourly employees of Coleman, were participants in the Plan, and were represented in a collective bargaining agreement with Coleman by the United Steel Workers of America, AFL-CIO and its Local No. 7494. (*Id.* ¶¶ 6, 8.) The Plan constituted a defined[3] employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), and was subject to coverage under ERISA pursuant to Section 4(a), 29 U.S.C. § 1003(a). (*Id.* ¶ 9.)

The original 1955 version of the Plan was amended in 1979 and the amendments became effective in 1980. (Smith Aff. Ex. A.) The Plan was again restated and amended, effective January 1, 1984, (the "Plan"). (Rule 3(g) Stmt. ¶ 10.) The Plan was allegedly amended on August 16, 1988, on November 15, 1988, and on December 16, 1988, (the "December Amendment"). (*Id.* ¶¶ 11-13.) Two termination amendments were allegedly made to the Plan, one on June 15, 1989, and another on June 30, 1989. (*Id.* ¶¶ 14, 15.) With the exception of the December Amendment which was authorized by a six-person Executive Committee of the Board of Directors, (the "Board"), all the amendments were authorized by

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[2] Although Local Civil Rule 3(g) is now known as Local Civil Rule 56.1, the joint statement will be referred to as "Rule 3(g) Stmt."

[3] A defined contribution plan is a "plan which provides for an individual account for each participant and for benefits solely upon the amount contributed to the participant's account." 29 U.S.C. § 1002(34). A defined benefit plan means a plan other than a defined contribution plan. 28 U.S.C. § 1002(35).

Coleman's Board. (*Id.* ¶ 16.) Pursuant to the Plan, and a trust agreement implemented on August 1, 1977 (the "Trust Agreement"), the assets of the Plan were held in trust by Union National Bank. (*Id.* ¶ 20.)

The Lantern Acquisition Corp. ("Lantern"), a wholly owned subsidiary of MacAndrews Kansas, was formed prior to March 19, 1989, for the purpose of acquiring Coleman. (*Id.* ¶¶ 25-26.) MacAndrews Kansas is wholly owned by MacAndrews & Forbes. In 1989, Defendant Ronald O. Perelman owned all of the outstanding stock in MacAndrews & Forbes. (*Id.* ¶ 26.) An Agreement and Plan of Merger ("Merger Agreement") was drafted and dated March 19, 1989, among Coleman, Lantern, and MacAndrews & Forbes. (*Id.* ¶ 27.) A tender offer was drafted and dated March 24, 1989, between Lantern and the shareholders of Coleman. (*Id.* ¶ 28.) All plans, agreements and amendments since the inception in 1955 were drafter [sic] exclusively by the Defendants.

At a Board meeting on April 19, 1989, in partial fulfilment [sic] of the Merger Agreement, ten directors resigned and ten new directors were elected by the Board, effective upon Lantern's payment for shares purchased pursuant to the Tender Offer. (*Id.* ¶ 30.) On April 24 or 28, 1989, Lantern purchased and paid for 6,983,678 shares of Coleman common stock, representing 97.5% of the number of shares of Coleman which were outstanding as of February 28, 1989. (*Id.* ¶ 34.)

As of June 30, 1989, Coleman terminated the Plan. (*Id.* ¶ 42.) A total of $13,895,380.00, representing all remaining assets of the Plan after purchase of annuities for, and lump sum distributions to Plan participants and

beneficiaries, was paid to Coleman. (*Id.* ¶ 46.) It is these monies that are at issue.[4]

II. DISCUSSION

A. Summary Judgment

The principles applicable to summary judgment are familiar and well-settled. Summary judgment may be granted only when there is no genuine issue of material fact remaining for trial, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Corselli v. Coughlin*, 842 F.2d 23 (2d Cir. 1988). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

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[4] Plaintiffs bring ten causes of action. The first is a claim based on a violation of ERISA, 29 U.S.C. § 1344(d)(1)(C). The second is based on an ERISA violation, 29 U.S.C. § 1344(d)(1)(B). The third is based on an ERISA violation, 29 U.S.C. § 1344(d)(2)(A). The Fourth Cause of Action is a violation of ERISA, 29 U.S.C. § 1132(a)(1)(B), (a)(3). Fifth is a breach of fiduciary duty pursuant to ERISA, 29 U.S.C. § 1104. The Sixth Cause of Action is for equitable and promissory estoppel. The Seventh Cause of Action is another ERISA violation, 29 U.S.C. § 1106. The Eighth Cause of Action is an ERISA violation, 29 U.S.C. §§ 1021(a), 1132(c)(1). Cause of Action nine is a violation of Section 301 of the Labor Management Relations Act. The Tenth Cause of Action is for an ERISA violation, 29 U.S.C. § 1105.

As a general rule, all ambiguities and all inferences drawn from the underlying facts must be resolved in favor of the party contesting the motion, and all uncertainty as to the existence of a genuine issue for trial must be resolved against the moving party. *LaFond v. General Physics Serv. Corp.*, 50 F.3d 165, 171 (2d Cir. 1995). As is often stated, "[v]iewing the evidence in the light most favorable to the nonmovant, if a rational trier could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." *Binder v. LILCO*, 933 F.2d 187, 191 (2d Cir. 1991).

"ERISA establishes a general requirement that plan assets be held in trust, and creates a presumption that plan assets held under a trust agreement inure to the benefit of the employees." *Rinard v. Eastern Co.*, 978 F.2d 265 (6th Cir. 1992), *cert. denied*, 507 U.S. 1029 (1993) (citations omitted); 29 U.S.C. § 1103(c)(1). "Except as provided in paragraph (2), (3), or (4) or subsection (d) of this subsection, or under sections 1342 and 1344 . . . the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1); *Rinard*, 978 F.2d at 268. Section 1344(d)(1) of Title 29 of the United States Code states that "[a]ny residual assets of a single-employer plan may be distributed to the employer if – (A) all liabilities of the plan to participants and their beneficiaries have been satisfied, (B) the distribution does not contravene any provision of the law, and (C) the plan provides for a distribution under these circumstances." 29 U.S.C. § 1344(d)(1). Here it is undisputed that the

liabilities of the Plan have been satisfied, and there is no dispute to the lawfulness of that distribution. Whether the Plan provides for distribution of the remainder of the monies to the employer is the issue to be resolved.

ERISA requires that plans be established by and conducted in accordance with written documents. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). An employee benefit plan under ERISA can be composed of more than one document. *Parrett v. American Ship Bldg. Co.*, 990 F.2d 854 (6th Cir. 1993); *Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans*, 607 F. Supp. 196, 207 (W.D.N.Y. 1984). In order to determine whether the Plan specifically provided for a distribution to Coleman, the Court looks to two documents: the 1984 Plan[5] and the 1977 Trust Agreement. The parties do not dispute that the

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[5] In December 1988, Coleman amended (ERISA mandates that a qualified plan have a specific amendment procedure, 29 U.S.C. § 1102(b)(3)) the Plan to include the following language "[i]f the Plan is being discontinued as to all employees, the Trustee shall dispose of such balance by returning it to the Company." (Rule 3(g) Stmt. Ex. D.) Although, the Defendants do not brief the argument, relying instead on the Plan itself, they posit that the express language of this amendment specifically allow the funds, upon settlement of all liabilities, to revert back to the Company. (Defs.' Mem. Law at 6.) However, Coleman failed to follow the proper amendment procedure by gaining "resolution of its Board of Directors." (Rule 3(g) Stmt. Ex. A ¶ 11.1(a).) The December Amendment was not adopted by the Board, but was merely consented to by the Executive Committee of the Board. (Rule 3(g) Stmt. Ex. D.) This procedure clearly violated the express provision of the 1984 Plan providing for amendment procedures. As such, the Court finds the December Amendment is invalid, and therefore is not considered.

1977 Trust Agreement and the 1984 Plan are controlling documents under ERISA.

Plaintiffs argue that the language of the 1984 Plan and the 1977 Trust Agreement provide for reversion of the funds to the employees; Defendants argue that the language of the same documents provides for reversion of the funds to the Employer.[6]

The Defendants bear the burden of establishing the factual predicates of their asserted right to a reversion. *See Donovan v. Cunningham,* 716 F.2d 1455, 1476-68 n.27 (5th Cir. 1983), *cert. denied,* 467 U.S. 1251 (1984); 29 U.S.C. § 1344(d)(1)(C). The plan must specifically provide for reversion. *Rinard,* 978 F.2d at 268 (reversion of surplus assets to an employer is precluded "unless there is specific and affirmative compliance with the conditions of § 1344(d)(1)(C)"); *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan,* 947 F.2d 246, 256 (7th Cir. 1991). Defendants argue that, where the liabilities of a Plan have been satisfied in full, "reversion of the surplus assets to the employer is the normal expectation of the parties." (Defs.' Mem. Law at 15.) The Court disagrees. It is well-established that there is a presumption that benefits of a Plan should inure to the benefit of the employees. *Rinard,* 978 F.2d 265; *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan,* 947 F.2d 246 (7th Cir. 1991); *Chait v. Bernstein,* 835 F.2d 1017 (3d Cir. 1987). Section 1344 provides that the surplus assets of a plan *may* revert to the

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[6] The Court deciding the motions on this argument does not address the second of Plaintiffs' arguments – that if a change of control occurred the funds should revert to the Plaintiffs.

employer, if three conditions are met. One of these conditions is that the Plan provide for reversion. The Court finds that this statute clearly calls for a phrase in the Plan allowing reversion.[7] *See, e.g., Chait,* 835 F.2d at 1022-2. Accordingly, the Court turns to the language of the plan documents to determine whether they clearly provide for reversion.

The 1977 Trust Agreement, established "to implement and carry out the provisions of the plan," (Rule 3(g) Stmt. Ex. H at 1), provides that "[u]pon termination of this

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[7] Much of the case law cited by Defendants is inapposite. For example, the cases deal with the limiting nature of language in plans that simply mimics the "exclusive benefit" language of ERISA. *Outzen v. FDIC,* 948 F.2d 1184 (10th Cir. 1991) (exclusive benefit language does not preclude reversion); *Chait v. Bernstein,* 835 F.2d 1017 (3d Cir. 1987) (same, also stating "we are reluctant to hold that in every case this language should be ignored, or to promote as a general rule that the embodiment of fiduciary responsibility contained in the "boilerplate" language is meaningless"). This is not an issue here because there is additional language beyond "exclusive Benefit" language and because there is no language which clearly permits reversion to the Defendants. Other courts deal with the situation where the amendment procedures of a plan do not allow amendment or where the proposed amendment would interfere with benefits provided to the employees in the plan. This is also not the case here. *International Union of Electronic, Electric, Salaried, Mach. and Furniture Workers, AFL-CIO v. Murata Erie N. Am., Inc.,* 980 F.2d 889 (3d Cir. 1992) (the court decided that an amendment specifically allowing for reversion, was not done contrary to language in the amendment procedure section of the plan); *Wilson v. Bluefield Supply Co.,* 819 F.2d 457 (4th Cir. 1987) (amendment section precluding amendment affecting the trust fund, which the court found not to include surplus assets); *Bryant v. International Fruit Prods. Co.,* 793 F.2d 118 (6th Cir. 1986), *cert. denied,* 479 U.S. 986 (1986).

Trust, the Trustee shall first reserve such reasonable amounts as it may deem necessary" for expenses but that the "balance of the Trust Fund shall be liquidated and distributed by the Trustee to or for the benefit of the employees or former employees of the Employer or their beneficiaries . . . , [t]he Employer shall have no beneficial interest in the Trust Fund either during its continuance or upon termination of this Trust, except as otherwise provided in the Plan." (*Id.* Ex. H ¶ 15.2.) From this last phrase and the language of the 1984 Plan, Defendants argue that the Plan allows for the remaining monies to revert to the employer.

The 1984 Plan is a redrafted and restated version of the original 1955 Plan. (*Id.* ¶¶ 4, 10.) The Plan states that "[n]o part of the Trust Fund shall revert to the company . . . , except after satisfaction of all liabilities of the Plan, any funds remaining in the Trust as a result of overpayment may revert to the Company. . . . " (*Id.* Ex. A at 46, § 9.2(c).) Each iteration of the relevant portion of the Plan contains the same phrase: "any funds remaining in the Trust Fund as a result of over-payment may revert to the Company." (*Id.* Ex. X, Article VII § 3; Smith Aff. Ex. A. § 7.3; Rule 3(g) Stmt. Ex. A § 9.2(c).) However, the Plan also states that when the Plan is terminated as to all employees, "the Trustee shall dispose of such balance as the Company may direct." (*Id.* at 54, § 11.5(d)(2).) Defendants argue that together these phrases permit the reversion of the funds back to Coleman.

Where a contract is unambiguous,[8] its interpretation can be determined as a matter of law. *Seiden Assocs. v. ANC Holdings, Inc.*, 959 F.2d 425, 426, 429 (2d Cir. 1992); *Kascewicz v. Citibank, N.A.*, 837 F. Supp. 1312, 1317 (S.D.N.Y. 1993); *Rothberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985); *Alternative Thinking Sys., Inc. v. Simon & Schuster, Inc.*, 853 F. Supp. 791, 795 (S.D.N.Y. 1994). When the contract is ambiguous, but the court, after considering the extrinsic evidence, concludes that there is only one plausible interpretation that can be drawn, a question does not exist. *Seiden*, 959 F.2d at 428; *Kascewicz*, 837 F. Supp. at 1317; *Rothberg*, 755 F.2d at 1019; *Alternative Thinking*, 853 F. Supp. at 795. "The objective of contract interpretation is to give effect to the expressed intention of the parties." *Rothberg*, 755 F.2d at 1019; *Seiden*, 959 F.2d at 428; *Alternative Thinking*, 853 F. Supp. at 795.

The Court finds that the Plan and the 1977 Trust Agreement are controlling documents, and, when read together, their language is ambiguous. Although the Trust

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[8] "[L]anguage is not ambiguous when it has a 'a definite and precise meaning, unattended by the danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference in opinion.' " *Seiden*, 959 F.2d at 428 (quoting *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989) (quoting *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 413 N.Y.S.2d 352 (1978))). Ambiguous language is capable of more than one interpretation by a reasonably intelligent person who has viewed the entire contract objectively and who is knowledgeable about the customs, contract and terminology of the trade or business. A contract is not ambiguous because each party urges a different interpretation. *Id.*

Agreement clearly states that any monies remaining in the trust shall be for the benefit of the employees and section 9.2 of the 1984 Plan states that only those funds resulting from an overpayment may revert to the Company, section 11.5(d)(2) of the Plan states that the "trustee shall dispose of such balance as the Company may direct." Accordingly, one paragraph provides for a determination by the Company regarding the remaining funds while the other sections provide for reversion only of overpayment. Although ambiguous, the Court finds that viewing all the evidence, there can be only one plausible interpretation of the Plan.

The 1977 Trust Agreement clearly states that any monies remaining shall not revert back to the company unless otherwise provided for in the Plan. The Plan does otherwise provide, stating that monies may revert *if* they result from "overpayment." Resolution turns on the word "overpayment." Webster's Third New International Dictionary defines "overpayment" as "payment in excess of what is due" or "the amount of such excess." Pursuant to the Plan, when an employer overpays it can recover those funds. It is undisputed that the surplus assets in the Plan resulted from a high return on monies invested in the Plan, not from excess money contributed to the fund. (Rule 3(g) Stmt. Ex. Y.) The Court finds that a return on an investment does not constitute an "overpayment." *See generally Frank L. Ciminelli Constr. Co. v. Buffalo Laborers Supp. Unemployment Benefit Fund*, 976 F.2d 834 (2d Cir. 1992). Thus, the 1984 Plan allows for reversion of funds resulting from overpayments; but not other funds.

However, Section 11.5(d)(2) allows payment of the funds as the Company may direct. Section eleven is entitled "Amendment, Termination, and Discontinuance" while Section nine is entitled "Miscellaneous Provisions." Specifically, section 11.5 is entitled "Distribution at Discontinuance" while Section 9.2 is entitled "Financing," subsection "Irrevocability." Although the titles appear to indicate that any instruction as what is to be done with surplus assets should be stated in section eleven, for the following reasons, section eleven is considered insufficient to allow reversion of the funds to Coleman.

First, the law is clear that pension plans are for the benefit of the employees and, in order to have reversion to an employer, the plan must clearly state that intention. The phrase "may direct" can easily be interpreted to mean the Company may direct the distribution of funds as long as it is done in compliance with the Plan. Section eleven of the Plan is permissive; it does not mandate that the funds shall revert to the employer. Defendants were apparently aware of this ambiguity, as shown by their failed attempt to amend section eleven of the Plan in December 1988.

Although Defendants amended section 11.5(d)(2) in 1984, to include a provision regarding a change in control, they did not amend the provision to provide clearly for reversion to the Company.

The Court notes Section 1344 of ERISA "ensures employers will 'not be penalized for overfunding 'in an abundance of caution' or as a result of a miscalculation on the part of an actuary." ' *Lynch v. J.P. Stevens & Co.*, 758 F. Supp. 976, 994 (D.N.J. 1991) (quoting *In re C.D. Moyer*

Co. Trust Fund, 441 F. Supp. 1128, 1132-33 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1273 (3d Cir. 1978)); *Outzen*, 948 F.2d at 1188. These circumstances have not occurred here – there is no allegation that the surplus resulted from overpayment of contribution payments; in fact, had the surplus resulted from overpayment of contributions Coleman would undoubtedly be entitled to the funds.

Finally, it is a well-established rule of contract interpretation that "[w]here an ambiguity exists in a standard-form contract supplied by one of the parties, the well-established contra proferentum principle requires that the ambiguity be construed against the party." *Kascewicz*, 837 F. Supp. at 1318 (quoting *Westchester Resco Co. v. New Eng. Reins. Corp.*, 818 F.2d 2, 3 (2d Cir. 1987); *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 443-44 (2d Cir. 1995); *Masella v. Blue Cross & Blue Shield of Conn., Inc.*, 936 F.2d 98 (2d Cir. 1991). Accordingly, in that the Defendants drafted the Plan with no language that specifically called for reversion of surplus assets to the Employer, the Plan shall be interpreted against them.

In light of the failed December Amendment, the clear language of the Trust Agreement, the vague and permissive language of section eleven, and the definition of the word "overpayment," the Court finds that section 9.2 controls, and that surplus assets resulting only from monies that resulted from overpaid contribution, may revert to the Defendants. Accordingly, Defendants are not entitled to any of the surplus assets.[9]

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[9] The Court having resolved the issue of the Plaintiffs' first argument, it need not reach the question of whether there was a

B. Class Certification

Although Plaintiffs have filed this as a class action, they have never moved for class certification. Plaintiffs are to do so within thirty days of the date of this Order, unless the parties can amicably agree on a class certification procedure.

III. CONCLUSION

Plaintiffs' motion for Summary Judgment on the first cause of action is granted; accordingly, the Plaintiffs' request for a declaratory judgment that Defendants have violated the terms of the Plan and that the Defendants be ordered to comply with the terms of the Plan, as herein interpreted, is granted.[10] The parties are to address the class certification issue before a sum certain judgment is entered.

SO ORDERED.

Dated: New York, New York
October 10, 1997

/s/ Deborah A. Batts
DEBORAH A. BATTS
U.S.D.J.

"change in control." (*See* Defs.' Mem. Law at 24-25; Pls.' Mem. Law at 22.)

[10] Plaintiffs having succeeded on the first cause of action, the Court hereby dismisses the remaining causes of action, without addressing Defendants' arguments regarding the legal sufficiency of several claims.

Supreme Court, U.S.
FILED
JUL 30 1999
OFFICE OF THE CLERK

No. 99-40

In The

Supreme Court of the United States

HAROLD E. SHEPLEY, JR., RICHARD A. KIMMEL, GARY L. MILLER, ELMER C. BEEMAN, JR., MARK E. DeFLORI, DOROTHY B. MARKER and a class of all others similarly situated,

Petitioners,

v.

NEW COLEMAN HOLDINGS INC., formerly known as THE COLEMAN COMPANY, INC., GLEN P. DICKES, DONALD G. DRAPKIN, WILLIAM J. FOX, HOWARD GITTIS, RICHARD E. HALPERN, FREDERICK W. MCNABB, JR., RONALD O. PERELMAN, BRUCE SLOVIN, FRED L. TEPPERMAN, CARL T. TSANG, WARREN B. ARMSTRONG, KENNETH J. WAGNON, RICHARD D. SMITH, MacANDREWS ACQUISITION (KANSAS), INC., MacANDREWS & FORBES HOLDINGS, INC., JAY DAVIS, JEFFREY CURTIS and TIMOTHY P. COTTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent New Coleman Holdings Inc. is owned by Respondent MacAndrews & Forbes Holdings Inc., which in turn is owned by Mafco Holdings Inc. Respondent MacAndrews Acquisition (Kansas) Inc. has been merged into Respondent MacAndrews & Forbes Holdings Inc.

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INTRODUCTION

This case is wholly inappropriate for review on certiorari. Contrary to Petitioners' contentions, there is no conflict among the Circuits: the Courts of Appeals have had no difficulty articulating a standard for determining when reversion of excess funds in a terminated defined benefit plan is permitted under ERISA. The unanimous Second Circuit decision in this case is entirely consistent with that standard, and with this Court's recent opinion in *Hughes Aircraft Co.* v. *Jacobson*, 119 S. Ct. 755, 761-62 (1999), which reaffirmed that participants in a defined benefit plan have "no entitlement to share in a plan's surplus — even if it is partially attributable to the investment growth of their contributions." The Court of Appeals opinion breaks no new ground. It is a straightforward — and clearly correct — interpretation of the provisions of a particular pension plan, resting on the specific language of that agreement and the specific facts of this case.

Petitioners are just as wide of the mark in arguing that this case presents the issue of whether a reversion provision must be "clear and affirmative." Even if there were reason for this Court to endorse such a standard — and there is not — the plan at issue here would satisfy it. As the Court of Appeals found, the language of the plan is unambiguous and makes sense only if reversion *is* permitted. Petitioners received every penny of the benefits they were promised under the plan — indeed, after termination, Respondents even instituted a replacement plan to provide uninterrupted coverage. The Court of Appeals properly determined that Petitioners sought an undeserved windfall not authorized under ERISA, and we submit that there is no good reason for this Court to disturb that result.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, are former employees of The Coleman Company ("Coleman" or the "Company") and former participants in The Coleman Company, Inc. Pension Plan for Weekly Salaried and Hourly Paid Employees (A66-67) (the

"Plan").[1/] Petitioners purport to represent an alleged class of 4,900 participants or beneficiaries of the Plan as of June 30, 1989 (A38-39, A68).

Respondents, defendants below, are Coleman; MacAndrews & Forbes Holdings Inc. ("MacAndrews"), which acquired Coleman; MacAndrews Acquisition (Kansas), Inc., a MacAndrews subsidiary formed for purposes of the acquisition; and sixteen individuals who were directors of Coleman and/or members of Coleman's Retirement and Benefits Committee.

The Plan and Trust Agreement

Under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), there are two broad types of single employer pension plans — defined contribution plans and defined benefit plans. *See* 29 U.S.C. § 1002(34) and (35). In a defined contribution plan, contributions are made to individual accounts for each participant, and benefits are based upon those contributions and any gains and losses attributable to each account. Participants' benefits from such a plan, therefore, include investment earnings attributable to that person's individual account. *See* 29 U.S.C. § 1002(34). A defined benefit plan, in contrast, specifies the pension benefits that beneficiaries will receive, and employer contributions are based upon actuarial estimates of the amounts that will have to be invested to provide those benefits. Employees are entitled to the prescribed benefits regardless of the investment performance of the plan's assets. As this Court recently explained, in a defined benefit plan:

> plan members generally have a nonforfeitable right only to their "accrued benefit," so that a plan's actual investment experience does not affect their statutory entitlement. Since a decline in the value of a plan's assets does not alter accrued benefits, *members similarly*

[1/] "A__" refers to the Joint Appendix in the Court of Appeals.

> *have no entitlement to share in a plan's surplus — even if it is partially attributable to the investment growth of their contributions.*

Hughes Aircraft Co. v. *Jacobson*, 119 S. Ct. 755, 761-62 (1999) (emphasis added).

The Coleman Plan was a defined benefit plan, funded solely by employer contributions. No employee contributions were required or allowed (A120). From its inception, the Plan provided that, upon termination, surplus assets — those not necessary to pay benefits — would revert to Coleman. The initial version of the Plan and each amendment called for repayment to the Company of the surplus, referred to as "funds remaining in the Trust Fund as a result of overpayment." Thus, in the original 1955 Plan, Article VII, Section 3 stated:

> The Company shall have no right, title, or interest in the contributions made by it to the Trustee, and no part of the Trust Fund shall revert to the Company *except that after satisfaction of all liabilities of the Plan any funds remaining in the Trust Fund as a result of over-payments may revert to the Company.*

(A620) (emphasis added).

The 1984 version of the Plan, which was in effect until the Plan's termination in 1989, provided in Section 9.2(c):

> The Company and any Adopting Employer shall have no right, title, or interest in the contributions made by it to the Trustee or Trustees, and, except as permitted by Section 15.4, no part of the Trust Fund shall revert to the Company or any Adopting Employer, *except that after satisfaction of all liabilities of the Plan, any funds*

> *remaining in the Trust Fund as a result of overpayment may revert to the Company* or Adopting Employer.

(A120) (emphasis added).

In addition to this language, each successive version of the Plan explicitly provided that the "balance" of funds remaining after satisfaction of Plan liabilities would be disposed of on termination "as the Company may direct." Each of these versions contained the following language, which appeared in Section 11 of the 1984 Plan:

> If the Plan is being discontinued as to all employees [and there is any balance remaining after satisfaction of liabilities], *the Trustee shall dispose of such balance as the Company may direct*.

(A128, A626, A694) (emphasis added).

Contrary to what Petitioners assert (Pet. 3), the August 1, 1977 Trust Agreement is consistent with these reversion provisions, as the Second Circuit ruled (App. 8). Petitioners assert that Paragraph 15.2 of the Trust Agreement "provided for distribution of surplus assets to the employees," but they quote that provision only *in part*. They deliberately omit the final, dispositive sentence of the paragraph, which makes it clear that Plan participants would be entitled to the surplus *only if the Plan did not provide otherwise:*

> The Employer shall have no beneficial interest in the Trust Fund either during its continuance or upon termination of this Trust, *except as otherwise provided in the Plan*.

(A325) (emphasis added). Similarly, the Trust's "exclusive benefit" provision, Paragraph 14, also defers to the Plan, using the same words ("except as otherwise provided in the Plan") (A324).

The Change in Control Provisions

By the 1980's, the funds generated by Coleman's contributions to the Plan were substantially more than enough to pay the promised benefits. As the resulting surplus would be available to the Company upon termination of the Plan, Coleman added "Change in Control" provisions designed to deter any hostile outsider who might be motivated to take over the Company, terminate the Plan, and recover the surplus. Section 9.2(c) of the Plan — the very section containing the "overpayment" language — was amended to prohibit reversion to the Company in the event of a hostile acquisition, which the Plan referred to as a "Change in Control":

> In the event of a Change in Control, such reversion shall not take place and the provisions of Section 11 shall apply.

(A120). As the Court of Appeals noted, this provision would have been unnecessary if the Plan did not provide for reversion of surplus assets to the Company.

Section 11.6 of the 1984 version of the Plan provided a means of allocating any surplus among participants in the event of a Change in Control (A128-29). The Plan contained no provisions, however, for allocating the surplus among participants if a Change in Control did *not* occur, further evidencing that the drafters of the Plan understood that any such surplus would revert to the Company.

The Acquisition of Coleman

In early 1989, the incumbent management of Coleman, led by Sheldon Coleman, sought unsuccessfully to purchase the Company. A fundamental assumption of this management effort — an assumption openly announced to Coleman employees, and not questioned by them or anyone else — was that, as long as the takeover was friendly, the Plan surplus would be available to the

Company after the acquisition. On February 22, 1989, Sheldon Coleman wrote to his fellow Coleman employees:

> Financing this buyout is a huge task. Not only does it take nearly $100 million of Coleman Family investments and loans, but we need other funds as well.
>
> *One place we can get some of these funds is from our two U.S. Pension plans that are "overfunded".* This "overfunding" resulted from our past successful investment of the assets dedicated to support future benefit needs. *The "overfunding" is available to the company after all future pension benefits are assured* through annuity contracts for each individual current employee and retiree. This includes all active participating employees, regardless of their length of service.
>
> As part of the buyout proposal we are suggesting terminating the pension plans, treating all participating employees as though they were vested, buying annuities which secure the future payment of your earned pension benefit, and then *releasing the amount of the overfunding to reduce the debt burdens of the Company.*

(A628) (emphasis added).

In June 1989, after the management proposal faltered, MacAndrews acquired Coleman on a friendly basis, through a tender offer that Coleman's Board of Directors unanimously recommended to shareholders (A70-71, A332-60, A705).

The Termination and Reversion

After the MacAndrews acquisition, Coleman terminated the Plan and recovered the surplus. This was done openly, in a publicly disclosed transaction reviewed by two government agencies — the Pension Benefit Guaranty Corporation and the Internal Revenue

Service. Throughout this process, no one ever suggested that the Plan's provisions for a reversion to the Company were inapplicable.

Upon termination, Coleman satisfied all of the Plan's liabilities to all Plan participants by purchasing a guaranteed annuity from Aetna Life Insurance Company and by making various lump sum distributions (A73, A595-600). The remaining $13,895,380 surplus was paid to the Company (A73, A599). Coleman then started a replacement pension plan, so that continuing employees continued to earn pension credits for post-termination service. There was no loss in benefits, and pension coverage continued uninterrupted (A532-33; A539).

This Action and the Rulings Below

Not a word of protest to the reversion was heard until 1995, when Petitioners filed this action just as the statute of limitations was about to expire. Even then, Petitioners did not assert the "overpayment" theory upon which they now rely. Rather, Petitioners began this action under the misconception that Respondents had somehow inadvertently triggered the Change in Control provisions of the Plan — an issue not raised in the Petition. It was only during briefing on cross-motions for summary judgment in the District Court that Petitioners came up with the theory that the word "overpayment" should be interpreted to bar a reversion.

Both sides moved the District Court for summary judgment on the issue of liability. Without hearing argument, the District Court granted summary judgment for Petitioners. The District Court found that Section 9.2(c)'s provision for reversion of "funds remaining . . . as a result of overpayment" did not apply to the surplus funds at issue, because those funds resulted from higher than expected investment return, "not from excess money contributed to the fund" (App. 29). The District Court recognized that this interpretation created a conflict between Section 9.2(c) and Section 11.5(d)(2), which, without any limitation, directed the Trustee to dispose of surplus funds "as the Company may direct," but the court sought to resolve this conflict by re-interpreting

Section 11.5(d)(2) to mean that the Company "may direct the distribution of funds as long as it is done in compliance with the Plan" (App. 30).

At Respondents' request, the District Court certified its order for interlocutory review under 28 U.S.C. § 1292(b). The Second Circuit accepted the interlocutory appeal, reversed the District Court's ruling, and directed the lower court to enter summary judgment for Respondents. The Second Circuit found that Sections 11.5(d)(2) and 9.2(c) of the Plan expressly and *unambiguously* provide for reversion of the surplus funds at issue (App. 10). It ruled that the word "overpayment" in Section 9.2(c) meant "the overage of the Plan assets (those contributed by Coleman, and any corresponding investment returns) net of plan liabilities (including the funding of vested pension obligations) at the time the Plan is terminated," and thus included the surplus funds at issue (App. 10). The Court observed that the contrary view of Petitioners and the District Court — that "funds remaining . . . as a result of overpayment" refers only to contributions that are excessive at the time the contributions are made — "rests on a misunderstanding of the fundamental nature of defined benefit plans":

> Because employers rely upon multi-variable actuarial estimates in determining the amount to contribute to their plans . . . it is inevitable that their contributions (plus any investment returns) will ultimately prove to be either more or less than required. . . . But the fact of a surplus or deficit, and its amount, can only be determined by hindsight.

(App. 11-12).

The Second Circuit noted that its reading of "overpayment" not only clarified the supposed "ambiguity" the District Court had found in the Plan, but was also confirmed by other parts of the Plan, including the Change in Control provisions:

> If (as the district court and the participants believe) the provisions they cite direct the surplus to Plan participants and beneficiaries, it would be unnecessary to provide specially for the channeling of surplus to Plan participants and beneficiaries in the event of a "Change in Control." But that is exactly what the Plan does.

(App. 13-14).[2/]

REASONS FOR DENIAL OF THE WRIT

I. There is No Conflict Among the Circuits

Petitioners' argument that the Court of Appeals' ruling creates a conflict among the circuits (Pet. 6-12) is simply incorrect. The Second Circuit's ruling rests on a logical — and clearly correct — construction of the Plan. ERISA clearly states that employers may recapture surplus pension assets after all liabilities of a plan have been satisfied, if the plan provides for such a reversion. *See* 29 U.S.C. § 1344(d)(1). The Second Circuit did not adopt any novel interpretation of the statute. It simply ruled that this particular plan does provide for reversion.

Contrary to petitioners' claims, the circuit courts have consistently rejected the notion that ERISA mandates a presumption against reversion. Case after case has stressed the important policy reasons in favor of *permitting* reversions to employers and recognized that awarding surplus pension assets to employees would create a windfall. For example:

[2/] On May 6, 1999, ten days after the Second Circuit issued its mandate, Petitioners filed a "motion for clarification" of the court's ruling, asking the court to amend its ruling to apply only to the "overpayment" issue and not to Petitioners' alternative theory that reversion was barred because Respondents had inadvertently triggered the Change in Control provisions. Petitioners' motion, which Respondents opposed, is still pending in the Second Circuit.

- *Hawkeye Nat'l Life Ins. Co.* v. *AVIS Industrial Corp.*, 122 F.3d 490, 502 n.7 (8th Cir. 1997):

> Several courts have recognized that a per se rule awarding residual or surplus assets to plan participants and beneficiaries does not necessarily promote ERISA's goals. These courts have recognized that awarding residual assets to participants and beneficiaries may undermine the financial stability of pension plans by penalizing employers for overfunding plans and thereby providing an incentive for employers to underfund plans so as to avoid losing residual assets upon termination of the plan. In addition, these courts have recognized that a per se rule awarding residual assets to participants may provide participants with a benefit for which they have not bargained.

- *Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1987):

> A rule that read ERISA "exclusive benefit" language to prohibit a reversion to the employer might tempt employers to be overly cautious in funding their plans. An employer that knew that it was prohibited from recapturing the surplus might be tempted to underfund its plan — a result that would benefit no one.

- *Jamail, Inc.* v. *Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 304 (5th Cir. 1992):

> [I]f ERISA is going to achieve its objective, it should encourage employers to err toward overpayment rather than to slight the fund because of a fear that there can be no effective restitution. If employers perceive that no refunds are available, they are likely to delay payment to the fund until they can calculate accurately the precise amount they owe. This denies to the fund working capital which could be crucial to its survival. It is true that

ERISA is properly construed to benefit employees, but a fundamental fairness to employers is implicit in establishing such funds.

In these and other cases, the lower courts have consistently upheld reversions of surplus assets to employers where, as here, the applicable plan provided for such a reversion.[3/] This Court's recent observation in *Hughes Aircraft* that participants in a defined benefit plan ordinarily "have no entitlement to share in a plan's surplus — even if it is partially attributable to the investment growth of their contributions," 119 S. Ct. at 761-62, confirms that these cases were correctly decided.

The cases that Petitioners rely upon (Pet. 7-8) are consistent with these authorities and with the Second Circuit's ruling here. In *Albedyll* v. *Wisconsin Porcelain Co.*, 947 F.2d 246 (7th Cir. 1991), the court denied reversion because the plan specifically provided that surplus funds would be distributed to *participants* upon termination, and specifically set forth a formula for doing so. *Id.* at 249 n.1, 256. In addition, plan outlines distributed to employees said that the employer "can neither recover any of its contributions to the plan nor any of the principal nor income of the funds created by the plan," and that on termination "all money previously contributed by the Company and the employees remains in the pension fund and will eventually be distributed to participants in the plan." *Id.* at 249 n.2 & n.3. Similarly, in *Rinard* v. *Eastern Co.*, 978 F.2d 265 (6th Cir. 1992), the court disallowed reversion where an earlier plan had expressly allowed for reversion, but the applicable plan *omitted* the reversion provision. *Id.* at 267, 269. In neither case did the court rule that an express provision

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[3/] *See, e.g.*, *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1318-19 (5th Cir. 1994); *Outzen* v. *FDIC*, 948 F.2d 1184 (10th Cir. 1991); *Washington-Baltimore Newspaper Guild Local 35* v. *Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd mem.*, 729 F.2d 863 (D.C. Cir. 1984); *Lynch* v. *J.P. Stevens & Co.*, 758 F. Supp. 976 (D.N.J. 1991).

providing for reversion to the employer was insufficiently "clear" or "affirmative" to satisfy ERISA's requirements, or that such a provision would have to meet some heightened standard of clarity.[4/]

Remarkably, Petitioners also rely upon the *district court* opinion in *Int'l Union of Elec., Elec., Salaried, Mach. and Furniture Workers* v. *Murata Erie N. Am., Inc.*, 772 F. Supp. 870, 872 (W.D. Pa. 1991), which barred an amendment to a plan that added a reversion provision. The Third Circuit *reversed* that ruling and discussed the important policy reasons *favoring* reversions. The appeals court stated:

> Because of the strong policy concern that employers not be encouraged to underfund defined benefit plans, *see* [*Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1987)], the language purporting to prohibit amendment to plan documents to allow for reversion of excess funds in a defined benefits plan must be quite explicit.

Int'l Union of Elec., Elec., Salaried, Mach. and Furniture Workers v. *Murata Erie N. Am., Inc.*, 980 F.2d 889, 906 (3d Cir. 1992).[5/]

Moreover, even if there were a case that adopted Petitioner's proposed standard, the Second Circuit's ruling here is in accord

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[4/] The court in *Rinard* refers to "ERISA's clear presumption against reversion," 978 F.2d at 269, but is plainly referring merely to ERISA's requirement that residual assets may not revert to the employer unless the plan so provides. *Rinard* does not suggest that a court should press to find a construction that bars reversion.

[5/] Petitioners also suggest that Congress is hostile to reversions because it has imposed taxes on funds that employers recover through reversions (Pet. 14-15). More to the point is that, even after repeated judicial decisions favoring reversion, Congress has never acted to bar reversions and has left the standard under 29 U.S.C. § 1344(d)(1) unchanged.

with such a standard. The court found that the Coleman Plan does provide for reversion expressly and unambiguously (App. 10). Therefore, this case does not truly raise the "Question Presented" that Petitioners propose — even if this Court were to adopt the standard that Petitioners advocate, the result in this case would not be changed.

II. The Court Below Correctly Construed the Coleman Plan as Providing for Reversion of the Surplus Funds at Issue

As discussed above, the Second Circuit's ruling turned not on any novel interpretation of ERISA but rather on a careful reading of the Plan itself. The Court of Appeals' construction of the particular language of this Plan will not affect anyone other than the parties themselves, and is entirely correct.[9]

Section 9.2(c) of the Plan specifically provides that, "after satisfaction of all liabilities of the Plan, any funds remaining . . . as a result of overpayment may revert to the Company"(A120). In addition, Section 11.5(d)(2) provides that, upon termination, the Trustee shall dispose of any and all surplus funds "as the Company may direct" (A128). For a host of reasons, the authors of the Plan could not possibly have intended that broad reversion language to carve out an exception for surplus funds resulting from Company contributions that generated higher than expected investment returns, which is the way the District Court erroneously interpreted the Plan.

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[9] Respondents and the *amici* who supported Respondents' position in the Court of Appeals — the American Academy of Actuaries and American Society of Pension Actuaries — argued below that the *District Court's* opinion, which incorrectly adopted a presumption against reversion, would have had far-reaching negative consequences for the private pension system. But the Court of Appeals' decision, which avoids such a departure from existing case law, has no such effects.

As the Second Circuit correctly ruled, construing the Plan to bar such a reversion would make no sense in the context of a defined benefit plan. In such a plan, excess funds generated by successful plan investments *are* "funds remaining . . . as a result of overpayment," and the normal expectation is that such funds will revert to the employer upon termination. A defined benefit plan specifies the benefit to be paid, not the amount of the employer's contribution. *See Hughes Aircraft Co.* v. *Jacobson*, 119 S. Ct. 755, 761-62 (1999). Contributions to a defined benefit plan are calculated annually by an actuary, who tries to predict what amount will suffice to provide future promised benefits, based on estimates and projections about future developments. *See Brillinger* v. *General Electric Co.*, 130 F.3d 61, 62 (2d Cir. 1997), *cert. denied*, 119 S. Ct. 1025 (1999); *Wachtell, Lipton, Rosen & Katz* v. *C.I.R.*, 26 F.3d 291, 293-94 (2d Cir. 1994); *Denton* v. *First Nat'l Bank of Waco, Texas*, 765 F.2d 1295, 1298 n.5 (5th Cir. 1985).

One of the important factors the actuary must estimate is future return — that is, what the fund will earn by investing the company's contributions. If the actuary underestimates investment return, then the employer's payments will ultimately prove to have been higher than was necessary to fund the benefits — they will thus turn out at termination to have been *overpayments*, resulting in a plan that is overfunded. In other words, in a defined benefit plan, overfunding as a result of successful investments and surplus funds "remaining as a result of overpayment" are the same thing. Whether there has been an "overpayment" can be determined only in the light of hindsight — the very reason why Section 9.2(c) provides for that determination to be made at the time of Plan termination. Calculation of funds "remaining" because of "overpayments" at termination can refer *only* to that amount left over after obligations to pay benefits are discharged, as the Second Circuit correctly ruled.

The Plan language confirms this interpretation. Section 9.2(b)(2) states that "[t]he Company expects to make sufficient contributions to provide the benefits specified in the Plan" (A120). That sets the standard for what "overpayment" means in

Section 9.2(c): contributions that later prove to have been in excess of what is "sufficient . . . to provide the benefits specified in the Plan." If it is ultimately determined on termination that the Company contributed more than necessary to fund Plan benefits, there are surplus funds "remaining as a result of overpayment." Section 9.2(c) provides that, after the liabilities to Plan participants are satisfied, these remaining funds may revert to the Company (A120). Similarly, Section 11.5(d)(2) specifically provides that all surplus funds are to be disposed of pursuant to the Company's direction, without any exception for funds resulting from successful Plan investments. Indeed, as the District Court itself recognized, reading Section 9.2(c) to bar reversion of the funds at issue here creates a conflict — a completely unnecessary conflict — with Section 11.5(d)(2). When one harmonizes these provisions, as the Court of Appeals ruling does, it becomes plain that they both contemplate reversion of all surplus funds. Tellingly, Petitioners have been unable to offer any plausible explanation of what funds the "as a result of overpayment" phrase was intended to cover if it was not intended to apply to the funds at issue here.

In accord with the Second Circuit's ruling, cases and agency rulings routinely refer to the type of surplus funds at issue here as funds resulting from "overpayment." *See, e.g., Wilson* v. *Bluefield Supply Co.*, 650 F. Supp. 578, 582 (S.D. W. Va. 1986), *aff'd*, 819 F.2d 457 (4th Cir. 1987); *Delgrosso* v. *Spang and Co.*, 769 F.2d 928, 935 (3d Cir. 1985); *Unitis* v. *JFC Acquisition Co.*, 643 F. Supp. 454, 458 (N.D. Ill. 1986); I.R.S. Priv. Ltr. Rul. 8951066, 1989 WL 597342, at 3 (issued Dec. 22, 1989) (A1490); I.R.S. Gen. Couns. Mem. 39806, 1990 WL 698043, at 6 (published Jan. 16, 1990) (A1499).

The 1984 version of the Plan also included the new Change in Control provisions, designed to keep the pension surplus out of the hands of a hostile acquiror of Coleman. As the Second Circuit correctly noted, no such precautions would have been necessary if the Plan already provided that Plan participants, rather than the Company, were entitled to the existing surplus. The Plan should not be interpreted to make these provisions meaningless. Even

more, the 1984 Plan contained new provisions specifying precisely how any surplus delivered to Plan participants would be allocated among them — but those provisions are expressly *limited* to the Change in Control situation. There is no provision for allocating surplus funds among participants if no Change in Control occurs — because, absent a Change in Control, the Plan required that all surplus funds revert to the Company.

In sum, the record overwhelmingly demonstrates that the Court of Appeals correctly interpreted the Plan as providing for reversion of the surplus funds at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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